88-1030

No. 88-____

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

BARBARA BROWN,
Petitioner

v.

STATE OF ARKANSAS,
Respondent

ON WRIT OF CERTIORARI TO THE
ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

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TREVATHAN PRESS ▪ LITTLE ROCK

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QUESTIONS PRESENTED

I. Whether Fourteenth Amendment Due Process requires that state law enforcement officers have reason to believe that a person is criminally inclined prior to their solicitation to commit an offense.

II. Whether Fourteenth Amendment Due Process permits state law enforcement officers to pay informants a commission based upon the number of their successful solicitations to commit crimes.

III. Whether Fourteenth Amendment Due Process permits state law enforcement officers to supply inducements such as intimate friendship and sex, for the purpose of causing persons to commit an offense.

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No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BARBARA BROWN,

PETITIONER,

V.

STATE OF ARKANSAS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

OPINION BELOW

The opinion of the Arkansas Court of Appeals is reproduced verbatim at appendix "A." The opinion was not designated for publication.

JURISDICTION

Petitioner requests that this Court review the judgment of the Arkansas Court of Appeals affirming Petitioner's conviction for sale of marijuana which was published September 14, 1988, and which, following request for rehearing, became final October 19, 1988. The opinion is set out at appendix "B" of the appendix, and the order denying the petition for rehearing is set out at appendix "C." Orders denying petitions for rehearing in Arkansas are entered in letter form as shown. The Arkansas Court of Appeals is the court of last resort in cases such as Petitioner's.

This petition for certiorari is being filed within sixty days of the denial of the petition for rehearing, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV (Appendix C).

STATEMENT OF THE CASE

Procedural History

Petitioner was convicted in the Circuit Court of Pope County, Arkansas, of four counts of selling marijuana and sentenced to four terms of three years

each. She asserted the defense of entrapment.

An appeal was taken to the Arkansas Court of Appeals which was her court of last resort within the state system. The convictions were affirmed in an opinion dated September 14, 1988, and rehearing was denied by order dated October 19, 1988. The opinion and order appear at appendix "A" and "B."

Factual History:

Petitioner contends that several practices of law enforcement combined to deny her basic Fourteenth Amendment Due Process rights. The practices include: (1) Retaining persons having pending criminal charges as "confidential informants" and paying them commissions and bonuses based upon the number of sales which they are able to generate. (2) Permitting the "confidential informants" to solicit transactions without restriction as to the persons who could be solicited. (3) Allowing "confidential informants" to use methods of persuasion, including sex, designed to influence persons to commit crimes.

Local and state law enforcement, using federal grant money for narcotics enforcement, retained Gary Pruitt as a "confidential informant" to set up drug sales to undercover officers. He was promised that the pending criminal charges against him would be dismissed and that he would receive "$25.00 a head" for all drug transactions which he could bring about. In addition, he

received bonuses which totaled approximately $2,000.00 at the time the program was terminated.

Mr. Pruitt was installed as a paid disc jockey at a night club and furnished an apartment. He was instructed to "buy dope." There was no requirement that the persons solicited be suspected drug dealers and no restriction as to the number of approaches that might be made. Mr. Pruitt agreed that he flirted with women at the club, went to bed with them, and asked them to get marijuana for him. He stated that this procedure had been "all right with him so far"; and that it would be fair to say that he would do anything for a sale except go to bed with a man or do anything "out of line with the law."

It was undisputed that Mr. Pruitt "flirted" with Petitioner when they first met and that he later had sex with her. She contended that the first instance preceded the first sale, while Mr. Pruitt contended that it took place the following day. Mr. Pruitt testified that drugs were not mentioned during sex, and that it had nothing to do with the transactions. He also denied that he had used persuasion in any form to bring about the sales.

In all but one instance law enforcement provided the money for the purchases. Petitioner made the purchases and brought back the marijuana. On one occasion she was able to purchase marijuana for less than the anticipated price and brought the excess money

back to the officers. On the occasion when she was not provided the money in advance, she made the purchase on credit. All of this was undisputed, as was the fact that Petitioner had no criminal record whatever.

The female officer who actually provided the money for the purchases, Officer Kim Powell, posed as another of Pruitt's friends. She agreed that Pruitt was "trading on a friendship all the way" in bringing about the transaction and explained that in her experience one could only convince persons to sell marijuana through friendship. She also stated that she had no indication that Petitioner would have committed the offense without an appeal to friendship.

The federal questions sought to be reviewed here were raised in the court in the first instance in a pre-trial brief which, unfortunately, is not a part of the record, although the record contains references to this brief. At page 49 of the trial transcript, in Petitioner's brief in support of her motion for new trial the following paragraph demonstrates that the arguments were made, although the actual words "Fourteenth Amendment Due Process" do not appear:

> As pointed out in Defendant's pre-trial brief on entrapment, one of the considerations is whether there was any reason to suspect that a persons being approached and requested to violate a law had been involved in such activity

previously. There was no way to adequately represent the defendant without showing that she had no arrests prior to being approached by the officers and was not known or reasonably suspected by them to have had any dealings with marijuana.

The next paragraphs in the brief argue the application of the reasoning in *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 2d 413, and *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 413, which, of course, are the two principal cases decided by this Court involving the issues in question and applying them to federal court proceedings.

In arguing for a requested instruction counsel for Petitioner argued the application of *Sherman v. United States* at the state level as shown at page 62 of the trial transcript.

At page 359 of the trial transcript counsel for Petitioner, again arguing for the requested instruction, stated that: " . . . this is the law, the United States federal law, and we are claiming protection under the federal Constitution as well as the Constitution for the State of Arkansas, the due process clause."

At the appellate level the question was argued as the second point on appeal at page 83 of Petitioner's first brief: "The actions of the state and its agents should be

held to be violative of due process and public policy." Under this heading the first paragraph argues that:

> Due process issues seldom enter into entrapment defenses, but Appellant would like to point out that the use of agents to persuade those whom they do not even suspect of criminal activity is a perversion of justice. Providing financial incentives to already obligated informants clearly invites impropriety of the sort apparent in this case, and the use of such incentives should not be condoned. The fact that an agent might recover expenses is not particularly objectionable, but Appellant contends that the practice of turning commission agents loose on the public to induce sales of controlled substances without qualification or regard to predisposition of the induced party to commit an offense is abhorrent to the extent that it may be said to violate due process.

The Arkansas Court of Appeals, at page 3 of its opinion (appendix "A"), stated that: "Brown argues that the State's conduct violates her rights under the due process clause of the 14th Amendment of the United States Constitution. Because this argument was not raised in the trial court, we do not address it."

It is true that there is only one reference to the due

process clause in the trial record, but the issues which Petitioner seeks to argue were made to the trial court.

REASONS FOR GRANTING THE WRIT

Although the defense of entrapment has not itself been accorded constitutional status, Petitioner would like the opportunity to argue that there are Fourteenth Amendment Due Process limitations upon the states which are closely related to the defense of entrapment and which limit the conduct of its law enforcement officers.

The first of these proposed limitations is that there should be some reason to believe that the person to be solicited is somehow involved in criminal activity related to the solicitation. Persons who have exhibited no inclination to commit a crime should not be approached and tempted for the sole purpose of obtaining a criminal conviction. To permit unlimited solicitation seems inconsistent with the Constitution in that the due process clause permits deprivation of liberty only in order to accomplish a legitimate objective of society, and that legitimate objective seems to be missing here.

Secondly, state law enforcement should not be permitted to hire persons on a commission basis to solicit criminal acts. Their compensation, if any, should bear a relation to the time spent in their efforts. If

criminals are to be given this sort of work, their incomes and the dispositions of their own criminal cases should not depend upon their success.

Finally, Petitioner believes that it should be argued that Fourteenth Amendment Due Process does not allow state law enforcement to furnish motives not usually associated with success in the particular criminal endeavor. Sex and intimate friendship should not be the inducement in a narcotics case.

The issues in this case will be raised many times in the future as greater efforts are made to control narcotics traffic, and fundamental rights are involved which could properly be addressed at this time. Also, the true extent of the country's drug problem cannot be determined when it becomes difficult to determine how much of the problem is attributable to law enforcement.

CONCLUSION

For all the reasons set forth in this Petition, Petitioner respectfully prays that the Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dale W. Finley, hereby certify that, three copies of this Petition for Writ of Certiorari have been deposited within a United States Post Office, with first class postage pre-paid, addressed to:

Honorable Steven Clark
Attorney General
200 Tower Building
Little Rock, Arkansas 72201

on this 19th day of December, 1988.

DALE W. FINLEY

APPENDIX

APPENDIX A

Opinion of the Arkansas Court of Appeals
Delivered September 14, 1988

NOT DESIGNATED FOR
PUBLICATION SEE REVISED
SUPREME COURT RULE 21

DIVISION I

ARKANSAS COURT OF APPEALS

NO. CACR 88-61

Opinion Delivered September 14, 1988

BARBARA BROWN APPELLANT

V.

STATE OF ARKANSAS APPELLEE

Appeal from Pope County Circuit Court
Honorable John S. Patterson, Circuit Judge

AFFIRMED

JOHN E. JENNINGS, Judge

Barbara Brown was convicted by a jury in the Circuit Court of Pope County of four counts of delivery of a controlled substance, marijuana, in violation of Ark. Stat. Ann. §82-2617 (Repl. 1976) (now Ark. Code Ann. §5-64-401 (1987)). She was sentenced to a total of 12 years in prison. At trial Brown admitted committing the offenses but contended that she had been entrapped.

On appeal Brown raises eight points for reversal. We find no error and affirm.

Brown's primary argument on appeal is that the trial court erred in refusing to hold, as a matter of law, that she had been entrapped. The trial court viewed the issue as one of fact and submitted it to the jury under the appropriate instruction, AMCI 4007. We hold that the trial court was correct.

Entrapment is defined by Ark. Stat. Ann. §41-209 (Repl. 1977) (Ark. Code Ann. §5-2-209 (1987)):

> Entrapment.—(1) It is an affirmative defense that the defendant was entrapped into committing an offense. (2) Entrapment occurs when a law enforcement officer or any person

> acting in cooperation with him induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

When the defendant offers evidence of entrapment the question will ordinarily be one of fact for the jury. *See Leeper v. State*, 264 Ark. 298, 571 S.W.2d 580 (1978); *Clark v. State*, 258 Ark. 490, 527 S.W.2d 619 (1975); *Peters v. State*, 248 Ark. 134, 450 S.W.2d 276 (1970). We could say that there was entrapment as a matter of law only if there was no factual issue to be resolved in the trial court. *Leeper, supra; Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982).

The primary witness for the State was Gary Pruitt, a confidential informant working with the Arkansas State Police. He was employed as a disc jockey at the T-Bird Club in Pope County. Pruitt was paid $25.00 per arrest and also received "bonuses." He had originally done undercover work in Fort Smith in exchange for having some charges against him dropped.

Pruitt testified that he was popular with the ladies at the club because they thought of him as a celebrity. He said that he had the names of some drug traffickers, and that he would try to become friendly with them to set up

drug sales. He testified that he first met Barbara Brown at the club on about January 14, 1987, and talked with her at that time about the possibility of buying marijuana. He gave her his phone number. He did not see her again until January 16, when she called him and said she was going to get some marijuana and asked him if he would be interested. He said he was and later that day she brought a quarter of an ounce of marijuana to his apartment, for which she was paid $80.00. On January 19, Pruitt bought one ounce of marijuana from her, at his apartment, for $120.00. Pruitt testified that on January 20 or 21, Brown came to his apartment and they had sexual relations. He said that before that afternoon their relationship had been "casual," although he admitted that he might have been "flirting" with her. Subsequent buys were made on January 22 and January 27. Pruitt testified that he persuaded people to sell marijuana using any method that he could, but that this was not what he did with Brown. He testified that he did not make any promises to her or play on her emotions, and that he did nothing to entrap her. He also testified, however, that he had sexual relations with another woman who subsequently pled guilty to drug charges.

Barbara Brown testified that she was normally a law-abiding person, had never been in any kind of trouble, and felt that she had been "trapped." She testified that she got the marijuana for Pruitt because she thought she loved him. The most important difference between her testimony and Pruitt's is that she

said that they had sexual relations on January 15, 1987, one day before the first drug transaction.

Neither the trial court nor the jury was required to believe the appellant's testimony, nor to give it greater weight than that given to the confidential informant's. *Harper, supra.* On appellate review we must view the evidence in the light most favorable to the State. *Leeper, supra.*

On these facts we agree with the trial court that the issue of entrapment was one of fact for the jury. Apart from the conflict between the testimony of Pruitt and that of Brown, it was appropriate for the jury to decide whether Pruitt's conduct was such as to be "likely to cause normally law-abiding persons to commit the offense." The question is not whether we approve of Pruitt's conduct. The question is whether the trial court erred in refusing to take the issue of entrapment from the jury.

Brown argues that the State's conduct violates her rights under the due process clause of the 14th Amendment of the United States Constitution. Because this argument was not raised in the trial court, we do not address it. *See Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985). She also argues that public policy considerations require reversal. It is true that the concept of entrapment as a defense was founded on public policy considerations—it originated in decisions of

the United States Supreme Court as a matter of federal common law. *See Butts v. United States*, 273 F. 35 (1921), and *Sorrells v. United States*, 287 U.S. 435 (1932). The public policy of this state, however, is primarily expressed in its statutes. *See Arkansas Louisiana Gas Company v. Hardin, Commissioner of Revenues*, 206 Ark. 593, 176 S.W.2d 903 (1944). If our statute establishing and defining the defense of entrapment is not adequate to express what appellant argues should be this state's public policy, that issue should be addressed to the legislature.

Appellant next argues that the court erred in refusing to give the following requested instruction:

> If a series of offenses result from a single incident of entrapment it is not necessary that the defendant prove that she was entrapped in each instance. Proof of an initial instance of entrapment is a sufficient defense to subsequent and related conduct.

We are cited no authority for the proposition. The trial court gave AMCI 4001, the general instruction on affirmative defenses together with AMCI 4007 the instruction on entrapment, and told counsel he could argue the principle contained in the proposed instructions to the jury. The Arkansas Supreme Court has mandated, by per curiam order dated January 29, 1979, that the applicable AMCI instruction shall be used

unless the trial judge finds that it does not accurately state the law. We think that the AMCI instructions on the issue were adequate and that the trial court did not err in refusing to give the requested instruction.

It appears that when Brown was arrested in Little Rock several bags of marijuana were found in her car. The State advised the court in a pretrial hearing that it would not use the evidence in its case in chief but might seek to use it for rebuttal. In defense counsel's cross-examination of Officer Watkins the following occurred:

> Q. Okay. Whenever Barbara Brown was arrested did you interrogate her?
>
> A. No, sir, I didn't interrogate her.
>
> Q. Did you talk to her?
>
> A. Yes, sir, I did.
>
> Q. Did you tell her if she didn't come clean with you that you were going to take her child away from her?
>
> A. No, sir.
>
> Q. Did you tell her if she didn't come clean with you that you were going to see that she got forty years in the penitentiary?

A. No, sir.

Q. Did you try to get her to go up and buy marijuana from Vanderpool.

A. Yes, sir, I did that.

Q. And, what did she tell you?

A. She cooperated. She was going to. The subject never came through.

Q. She helped you and she told you everything you wanted to know, didn't she?

A. Not everything that I wanted to know, no.

Q. What did you ask that she didn't tell you?

A. Well about the seven bags of marijuana that was in her car. She never explained that to me.

Defense counsel then moved for a mistrial which the trial court denied. No doubt the answer was prejudicial to the appellant, but it was elicited by defense counsel and was clearly responsive to the question asked. We find no abuse of discretion in the court's refusal to grant a mistrial. *See Dillard v. State*, 20 Ark. App. 35, 723

S.W.2d 373 (1987).

On direct-examination Barbara Brown testified that she obtained her car from "a domestic relation suit." On cross, the State established that she had received it from a Mr. Irby Ralph, Jr., and then asked if she had been married to Mr. Ralph. She testified that she had not been. On appeal Brown argues that this matter was irrelevant and immaterial. A determination of the relevancy of evidence is within the trial court's discretion and we will not reverse its ruling absent a showing of an abuse of discretion. *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984). Here the questions on cross went directly to matters raised on direct and were at least relevant to credibility. We find no abuse of discretion in permitting the questions.

One of the drug transactions which took place at Pruitt's apartment was video taped. A pretrial hearing was held on the issue of the admissibility of the tape. Both Pruitt and Officer Powell testified that the video tape was accurate and complete. The appellant testified that the tape did not show Pruitt kissing her as she came into the apartment nor their sitting on the couch talking before the tape was apparently turned on. There was evidence that the tape had been in the possession of two other police officers and a deputy prosecutor, none of whom testified. Appellant's argument is that the video tape should have been excluded because the chain of custody prior to the introduction of evidence, it is not

necessary to eliminate every conceivable possibility that the evidence has been tampered with; it is only necessary that the trial judge be satisfied that the evidence is genuine and, that with reasonable probability, it has not been tampered with. *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983). It is really a matter of authenticity under Ark. R. Evid. 901(b)(1). In determining the authenticity of taped statements, the trial court has some discretion and in the absence of evidence indicating tampering with the evidence we will not reverse the trial court's ruling unless we find an abuse of discretion. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984); *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978). Even if appellant's testimony is accepted at face value, we could not say the trial court abused its discretion in finding that the evidence was genuine and had not been tampered with.

Before trial "The Rule" was invoked. "The Rule" is now embodied in Ark. R. Evid. 615 which provides in pertinent part:

> Exclusion of witnesses—at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

Although Rule 615 does not so provide, it is standard practice for the court to admonish the witnesses

not to discuss the case, or their testimony, with each other. Without such an admonition "The Rule" could be easily circumvented. Here the court advised the bailiff to instruct the State's witnesses that they could not discuss their testimony with each other. Defense counsel also asked that the State's witnesses be "segregated, those that have testified and those that haven't." The court instructed the bailiff to segregate the witnesses. After the State rested, defense counsel advised the court that the witnesses had been seen together in the law library and asked for a mistrial. There was no indication that any of the witnesses had violated the court's admonition not to discuss his testimony in the case.

Although Rule 615 does not mention the "segregation" of witnesses, we do not doubt that the court has the inherent power to make such an order. But the declaration of a mistrial is a drastic remedy and the court is entrusted with a wide latitude of discretion in granting or denying a mistrial. *Moss v. State*, 280 Ark. 27, 655 S.W.2d 375 (1983). Its discretion will not be reversed absent abuse or manifest prejudice to the defendant. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 285 (1982). We find neither here.

Finally, appellant argues that the court erred in ordering that appellant's automobile be forfeited under Ark. Stat. Ann. §82-2629(a)(4) (now Ark. Code Ann. §5-64-505(a)(4)). This argument is based solely upon appellant's contention that she was entrapped as a

matter of law. Because we have held that the issue of whether appellant was entrapped was a question of fact for the jury, this argument must fail.

Affirmed.

CORBIN, C.J., and CRACRAFT, J., agree.

APPENDIX B

Order Denying Rehearing

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
Little Rock, AR 72201
October 19, 1988

Dale W. Finley
Attorney at Law
P.O. Box 761
Russellville, AR 72801

RE: CACR88-61 Barbara Brown v. State of Arkansas

Dear Mr. Finley:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied."

Sincerely yours,

Leslie W. Steen, Clerk

LWS:mf

cc: Joseph V. Svoboda
Juanita Barber, Clerk
(Circuit Court No. CR87-92)

APPENDIX C

Reference to Constitutional Provision
Relevant Portions of Amendment Fourteen

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.